**SAGONG TASI & ORS**

**v.**

**KERAJAAN NEGERI SELANGOR & ORS**

HIGH COURT MALAYA, SHAH ALAM
MOHD NOOR AHMAD J
[CIVIL SUIT NO: MTI-21-314-1996]
12 APRIL 2002

***LAND LAW:*** *Acquisition of land - Compensation - Whether adequate compensation - Compensation paid to aboriginal plaintiffs under Aboriginal Peoples Act 1954 - Whether plaintiffs should have been compensated under the Land Acquisition Act 1960 - Whether land acquired customary and ancestral land - Whether plaintiffs' acquired proprietary interest in land under common law - Whether plaintiffs' rights under common law and statutory law protected by art. 13 of Federal Constitution - Whether compensation paid inadequate within art. 13 thereof*

***LAND LAW:*** *Acquisition of land - Land occupied by plaintiff aborigines - Whether plaintiffs deprived of proprietary rights without adequate compensation - Whether 14-day notice of eviction unreasonable and insufficient - Whether defendants breached fiduciary duties to plaintiffs*

***LAND LAW:*** *Trespass - Liability in trespass - Acquisition of aboriginal land without adequate compensation - Whether government liable as public officer who issued notices to vacate land was not ascertained - Whether liability upon contractor who constructed highway on land and highway authority who maintained highway - Government Proceedings Act 1956, ss. 5, 6 & 18*

***LAND LAW:*** *Customary land - Proof of custom - Whether established*

The plaintiffs belonged to the aboriginal Temuan tribe who had occupied 38.477 acres of land at Kampong Bukit Tampoi, Dengkil, Selangor ('the Land'). The Land was classified as an aboriginal area under the Aboriginal Peoples Act 1954 ('the Act'). The plaintiffs were evicted from the Land following the acquisition of the Land for the purpose of the construction of a portion of the highway to the Kuala Lumpur International Airport. The plaintiffs were compensated for the loss of their crops, fruit trees and loss of their homes but not the value of the Land. The defendants refused to recognise that the plaintiffs had any proprietary interest in the Land. Hence, the plaintiffs' claim against the defendants for, *inter alia*, adequate compensation as stipulated in the Land Acquisition Act 1960 ('LAA'). The 1st defendant was the "Kerajaan Negeri Selangor" (the Selangor State Government), the 2nd defendant was United Engineers (M) Berhad (the contractor engaged to construct the highway), the 3rd defendant was Lembaga Lebuhraya Malaysia (the highway authority) and the 4th defendant was the Federal Government.

Two preliminary points were raised in the written submission submitted after the close of the case by the 1st and 4th defendants: (i) whether the 1st defendant had been correctly cited as a party as the "Kerajaan Negeri Selangor" and State Authority were two separate entities and s. 16(2) of the National Land Code ('Code') required that any action relating to land in which it is sought to establish any liability on the part of the State Authority shall be brought against the State Director in the name of his office; and (ii) whether the public officer who issued the notices to the plaintiffs to vacate the Land should have been named by virtue of ss. 5, 6(1), 6(4) and 18 of the Government Proceedings Act 1956 ('GPA').

**Held:**

**[1]** The 1st defendant was a necessary party being the authority pertaining to land in the State and the party which evicted the plaintiffs from the Land. Hence, s. 16(2) of the Code did not apply. Further, s. 447(1) of the Code provides that in matters relating to procedure not provided for by the Code, the rules of court shall prevail over the Code. The law is clear that a misjoinder of parties, if any, is never fatal to any cause or matter (O. 15 r. 6(1) Rules of the High Court 1980). (p 552 a-d)

**[1a]** The manner the preliminary point was raised was unfair to the plaintiffs. No explanation was advanced as to why the point was not raised at the trial. Also, it was not pleaded in the defence. Parties are bound by their pleadings and the court is not entitled to decide on a matter which is not pleaded. Further, a fundamental rule of natural justice is the right to be informed of any adverse point so that one has the opportunity of stating the answer. As the preliminary point was in the nature of a preliminary objection, it was incumbent on the 1st defendant to have given written notice to the plaintiffs of its intention to raise the issue, failing which it is deemed to have waived the objection. Further, there was an inordinate delay in raising the preliminary point which was fatal. (pp 552 e, h-i & 553 a-d)

**[2]** The Federal Court case of *Dewan Undangan Negeri Kelantan v. Nordin Salleh* held that if a party who claims that he is the right party to the suit stands by and does nothing although aware of the suit, he is as much bound by the decision as a party to the case. Hence, in this case, if the Selangor State Director of Lands and Mines was of the view that he ought to be the proper party to be sued, it was always open to him to raise an objection through the State Government. (p 553 e-f)

**[3]** The plaintiffs were entitled to rely on the doctrine of estoppel in litigation on the principle that a party is bound by the manner it has pleaded and conducted its case in court. In the present case, after having conducted the case on the basis that the 1st defendant was properly cited

as a party and cross-examining the plaintiffs' on its behalf, the 1st defendant should not now be allowed to reverse its stand and claim that it should never have been made a party. The 1st defendant was now precluded from changing course. (p 553 g-h)

**[4]** There was merit in the preliminary point raised that the public officer who issued the notices to vacate the Land must be named. Before the government can be held liable for trespass committed by its servant it must be proved that the servant has committed trespass. If he is not liable then the government is also exempted from liability. By virtue of ss. 5, 6 and 18 GPA, the identity of the officer must be ascertained and the liability of the officer must be established before the government can be made liable. (pp 554 a-h & 555 a)

**[5]** The plaintiffs had led evidence to prove that they still practised their Temuan culture. Therefore, the plaintiffs belonged to an aboriginal society within the meaning of the Act. The Land had also been occupied by the plaintiffs for at least 210 years and the occupation was continuous up to the time of the acquisition. The plaintiffs had inherited the Land from their ancestors and were the descendants of the Temuans who had resided at the Land since early times. Their tradition had been maintained from generation to generation. Also, the customs in relation to the Land were distinctive to the Temuan culture. As such, the Land was customary and ancestral lands belonging to the plaintiffs and occupied by them for generations. (p 564 c-e)

**[6]** The expert evidence adduced on the Temuan practices, customs, culture, traditions, political system and their way of life, could be relied upon because to a great extent it was supported by the evidence of other lay witnesses called by the plaintiffs and also based on the published works of other writers which were not hearsay but admissible under s. 45 of the Evidence Act 1950. The oral histories of the aboriginal societies relating to their practices, customs and traditions and on their relationship with land should also be admitted subject to the confines of the Evidence Act 1950, in particular s. 32(d) and (e) thereof. (pp 564 g-i & 579 g-i)

**[7]** The common law recognises a form of native title which reflects the entitlement of the aboriginal people, in accordance with their laws and customs, to their traditional lands. The High Court case of *Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor* which was confirmed by the Court of Appeal, held that the aborigines' common law rights include, *inter alia*, the right to live on their land as their forefathers had lived and that meant that even the future generation of the aboriginal people would be entitled to that right of their forefathers. Also, it was held that the Act did not exclude rights vested in the aboriginal people at the common law. (p 565 b-e)

**[8]** Not only did the plaintiffs have the right over the Land but also an interest therein. That view was fortified by the leading Privy Council case of *Amodu Tijani v. the Secretary, Southern Nigeria* which held that all members of the native community had an equal right to the land although the headman or the head of the family had charge of the land to hold the land for use of the community or family. The land remained the property of the community or family. The same could be said of the character of land tenure and use amongst the Temuan people based on the facts as found. However, the proprietary interest of the plaintiffs was only limited to the area of their settlement. (pp 565 g-h, 566 d-e & 570 c-d)

**[9]** The aborigines' rights under the common law and the Act are complementary to each other and are proprietary rights protected by art. 13 of the Federal Constitution *(Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor)*. It was evident that the defendants purported to compensate the plaintiffs for only what had been provided under the Act. Such compensation was not adequate within the meaning of art. 13(2) of the Federal Constitution. It followed, therefore, that the deprivation of the plaintiff's proprietary rights was unlawful because they were entitled to the compensation in accordance with art. 13(2) of the Federal Constitution. (pp 570 e-f & 572 h)

**[10]** The 1st and 4th defendants owed fiduciary duties to the plaintiffs on the following grounds: (i) by reason of the constitutional and statutory provisions; (ii) the Jabatan Hal Ehwal Orang Asli which was set up pursuant to the Act was charged with the responsibility of looking after the welfare of the aborigines; and (iii) in a 1955 document the then adviser on aborigines in the Colonial Government expressly declared responsibility for the welfare of the aborigines in the Bukit Tampoi area. The 1st and 4th defendants had breached their fiduciary duties to the plaintiffs by (i) the deprivation of their proprietary rights without adequate compensation; and (ii) by the unlawful eviction of the plaintiffs from the Land as the 14-day notice was unreasonable and insufficient being in non-compliance with the LAA procedure. Therefore the loss in consequence of the breach must be made good and that loss would be the value of the Land lost as a result of the 1st and 4th defendants failing to protect it. (pp 574 d-i & 575 a-g)

**[11]** As the plaintiffs were in possession of the Land, a trespass had been committed in respect of the Land. However, the 1st and 4th defendants were not liable in trespass by reason of s. 6(4) GPA since the identity of the relevant officer had not been ascertained and the liability of the officer had not been established. For the same reason, the 1st defendant was not liable in damages for the unlawful eviction. However, the 2nd

and 3rd defendants were liable in trespass and could not take shelter under the authority of the 1st and 4th defendants because trespass is against possession but not ownership. Their misdeeds were reflected by the presence of the highway on the Land which had been constructed by the 2nd defendant and maintained by the 3rd defendant. (pp 575 h-i & 576 a)

*[Order accordingly in favour of the plaintiffs.]*

**Case(s) referred to:**

*Adong Kuwau & Ors v. Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418* ***(foll)***
*Amodu Tijani v. The Secretary, Southern Nigeria [1921] 2 AC 399* ***(foll)***
*Bukit Melita Sdn Bhd v. Lam Geok Hee & Ors [1997] 4 AMR 3160* ***(refd)***
*Bullock v. London General Omnibus Co [1907] 1 KB 264* ***(refd)***
*Calder v. A-G of British Colombia [1973] 34 DLR (3d) 145* ***(refd)***
*Canadian Pacific Ltd. v. Paul et al; Attorney-General of Ontario, Intervener [1988] 53 DLR (4th) 487* ***(refd)***
*Delgamuukw v. The Queen in right of British Columbia et al; First Nations Summit et al, Interveners [1997] 153 DLR (4th) 193* ***(refd)***
*Dewan Undangan Negeri Kelantan v. Nordin Salleh [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72* ***(foll)***
*Hj Abdul Rahman v. Government of Malaysia & Anor [1966] 2 MLJ 174* ***(refd)***
*Johnson and Graham's Lessee v. William M'Intosh [1823] 21 US 681* ***(refd)***
*Kerajaan Negeri Johor & Anor v. Adong Kuwau & Ors [1998] 2 CLJ 665* ***(foll)***
*Lai Yoke Ngan v. Chin Teck Kwee [1997] 3 CLJ 305* ***(refd)***
*Lembaga Arkitek Malaysia v. Cheah Kim Fah & Ors [1999] 2 CLJ 937* ***(refd)***
*Mabo v. Queensland [1991-1992] 175 CLR 1* ***(refd)***
*Mabo & Ors v. State of Queensland & Anor [1986] 64 ALR 1* ***(refd)***
*Miriuwung and Gajerrong People & Ors v. State of Western Australia & Ors [1998] 159 ALR 483* ***(refd)***
*Muniandy & Anor v. Muhammad Abdul Kader & Ors [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116* ***(refd)***
*Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769* ***(refd)***
*Pareroultja & Ors v. Tickner & Ors [1993] 117 ALR 206* ***(refd)***
*Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen [1998] 1 MLJ 503* ***(refd)***
*R v. Abadom [1983] 1 All ER 364* ***(refd)***
*Siew Kong Engineering Works v. Kian Yit Engineering Sdn Bhd & Anor [1993] 2 SLR 505* ***(refd)***
*Stamford Holdings Sdn Bhd v. Kerajaan Negeri Johor & Ors [1995] 3 CLJ 114* ***(refd)***
*Steven Phoa Cheng Loon v. Highland Properties Sdn Bhd [2000] 4 CLJ 508* ***(refd)***
*The Wik Peoples v. The State of Queensland & Ors [1996] 187 CLR 1* ***(refd)***
*Wong See Leng v. C Saraswathy Ammal [1954] MLJ 141* ***(refd)***
*Yee Seng Plantation Sdn Bhd v. Kerajaan Negeri Terengganu & Ors [2000] 3 CLJ 666* ***(dist)***
*Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330* ***(refd)***

**Legislation referred to:**
Aboriginal Peoples Act 1954, ss. 2, 3(2), 11, 12
Civil Law Act 1956, s. 3
Evidence Act 1950, ss. 32(d), (e), 45, 48, 49, 50
Federal Constitution, arts. 4, 8(5)(c), 13(2), 89(1), (5), (6), 161A(6), 162(6)
Government Proceedings Act 1956, ss. 5, 6(1), (4), 18
National Land Code, ss. 4(2), 16(2), 447(1)
Rules of the High Court 1980, O. 15 r. 6(1)

**Other source(s) referred to:**
Bullen and Leake, *Precedents of Pleadings*, 10th edn, p 1
Judith Sihombing, *The National Land Code – A Commentary*, Malayan Law Journal Sdn Bhd, 1997, paras 353, 505-552
*Sarkar's Law of Evidence*, 15th edn, p 884

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*For the 1st defendant - Hj Mohd Zawawi Hj Salleh (Kamarolzaman Abidin)*
*For the 2nd defendant - Zaki Tun Azmi (Harjinder Kaur & Tan Siok Hui); M/s Rashid & Lee*
*For the 3rd defendant - Ramesh Sanghvi (Harmeet Singh); M/s Kassim Tadin, Wai & Co*
*For the 4th defendant - Pretam Singh Darshan Singh SFC (Lailawati Husin) Selangor State Legal Advisor*

*Reported by Usha Thiagarajah*

## JUDGMENT

**Mohd Noor Ahmad J:**

1. The plaintiffs sue in a representative capacity in respect of themselves and on behalf of each and every member of their respective families. The 2nd and 6th plaintiffs died and were properly substituted by their respective daughters. The suit was filed as the result of a dispute that arose out of the eviction of the plaintiffs and their respective families from 38.477 acres of land situated at Kampong Bukit Tampoi, Dengkil, Selangor (the land). In March 1996, the land was acquired for the purpose of the construction of a portion of the highway to the Kuala Lumpur International Airport. The land was in the shape of a strip running through a gazetted aboriginal reserve under the Aboriginal Peoples Act 1954 (the Act) and also land customarily occupied by the orang asli and therefore, classified as an aboriginal area or an aboriginal inhabited place under the Act. In the context of the purpose of the acquisition of the land the 1st defendant (the Selangor State Government) is the acquiring authority which acquired the land through the Sepang District Office, the 4th defendant (the Federal Government) is the decision-maker to undertake the construction of the highway, the 3rd defendant (Lembaga Lebuhraya Malaysia) is the authority to supervise and execute the design construction and maintenance of the highway and the 2nd defendant (United Engineers (M) Berhad) is the contractor engaged to construct the highway.

2.(1) By this writ action the plaintiffs seek the following declarations:

(a) that the plaintiffs are the customary owners, the original title-holders and the holders of usufructuary rights in respect of the land;

(b) that their customary ownership, original title and usufructuary rights to the land are not destroyed, restricted or extinguished;

(c) that their ownership, title and usufructuary rights and/or that of the orang asli and of their ancestors to the land are entitled to be protected by the 1st defendant by reason of a fiduciary duty owed or the existence of trust;

(d) that the 1st defendant owes a fiduciary duty to them and their ancestors or is their trustee in respect of the ownership, title and rights claimed;

(e) that the 1st defendant has no right to destroy, restrict or extinguish their ownership, title and rights to the land without compensation; and

(f) based on the reliefs sought, a declaration:

(i) that the exercise of any power or action taken by any person or authority to destroy, restrict or extinguish their customary rights and title to the land is not valid and therefore, null and void, in particular, the notice for vacant possession issued by the Sepang Land Administrator; and

(ii) that each of them as beneficial owners of the land is entitled to adequate compensation as stipulated in the Land Acquisition Act 1960 (the LAA) in respect of the land which had been destroyed, restricted or extinguished by or on behalf of the 1st defendant.

The plaintiffs also pray for the following orders:

(i) the 1st defendant to pay adequate compensation for the land;

(ii) the 2nd and 3rd defendants to pay damages for trespass;

(iii) the 1st defendant to pay damages for the illegal eviction;

and

(iv) for special damages.

(2) Consequently and in the alternative, the plaintiffs ask for the following reliefs:

(a) a declaration that the land is 'Malay reservation' within the meaning of art. 89(6) and protected under art. 89(1) of the Federal Constitution (the Constitution);

(b) a declaration that all actions taken by the defendants which deprived the plaintiffs of the use and enjoyment of the land are unconstitutional, invalid and therefore, null and void;

(c) a declaration that the land is protected by reason of usufructuary rights, customs and ancestral occupation;

(d) a declaration that the land is originally or based on laws protected;

(e) a declaration that it is the duty of the 1st and 4th defendant to protect the rights of the plaintiffs in the land under the Act read with arts. 8(5) and 162 or separately under art. 8(5) of the Constitution;

(f) a declaration that the 1st and 4th defendants are estopped from claiming, asserting or taking a stand that the land is not protected under the law by relying on their improper actions or failure to take proper steps to protect the rights of the plaintiffs to the land;

(g) damages; and

(h) interests and cost.

3. Briefly, the undisputed facts are these. The plaintiffs are orang asli of the Temuan tribe. Pursuant to the acquisition of the land, on 13 February 1996 the Sepang Land Administrator gave written notices to the plaintiffs to vacate the land within 14 days failing which enforcement action would be taken (the notices). The plaintiff did not comply for obvious reason that they were not happy with the amount of compensation. The 1st defendant claims that the land is State land and the defendants have refused to recognise that the plaintiffs have any proprietary interest in the land or any interest therein at all. Hence, the defendants have refused to compensate the plaintiffs for the value of the land lost except for the loss of their crops and fruit trees and the loss of their homes ie, the building structure only. On 21 March 1996, the plaintiffs were asked by the Sepang police to report at the Dengkil police station to collect their compensation cheques. Only the 3rd and 7th plaintiffs collected the cheques. On 22 and 27 March 1996 the plaintiffs were evicted from the land by a police operation with support from the FRU in the presence of the officials from the Sepang District Office, the officials of the 2nd and 3rd defendants and of the Jabatan Hal Ehwal Orang Asli (JHEOA). The fruit trees and the crops on the land were destroyed, the houses, the Balai Raya and the Balai Adat of the Temuan community thereat were demolished. On 14 June 1996, the plaintiffs received their cheques for the limited compensation under protest and without prejudice to their legal rights.

4.(1) Let me dispose off the preliminary points raised by the 1st defendant and adopted by the 4th defendant before proceeding any further. The issues of law are:

(a) whether the 1st defendant has been correctly cited as a party?; and

(b) whether the public officer, who issued the notices to vacate the land which are alleged to be invalid and therefore committed trespass to the Land, must be named?

These preliminary points were raised only in the written submission submitted after the close of the case.

(2) On issue (a), the 1st defendant contends that it should not be sued as 'Kerajaan Negeri Selangor' but as State Authority, or the State Director of Lands and Mines Selangor should be cited instead. The contention is premised on the fact that 'Kerajaan Negeri Selangor' and State Authority are two separate entities and s. 16(2) of the National Land Code 1965 (the Code) requires that any action relating to land in which it is sought to establish any liability on the part of the State Authority shall be brought against the State Director in the name of his office. The cases of *Yee Seng Plantation Sdn. Bhd. v. Kerajaan Negeri Terengganu & Ors* [2000] 3 CLJ 666; *Stamford Holdings Sdn. Bhd. v. Kerajaan Negeri Johor & 4 Ors.* [1995] 3 CLJ 114 and *Steven Phoa Cheng Loon v. Highland Properties Sdn. Bhd.* [2000] 4 CLJ 508 are cited in support thereof.

(3) With regard to issue (b), it is contended that when there is a need to decide whether a particular officer or officers, as the case may be, has/have committed trespass before the Government can be held liable, it is absolutely necessary to identify and name the particular officer or officers whom the plaintiffs alleged committed the trespass. Reliance is placed on the provisions of ss. 5, 6(1), 6(4) and 18 of the Government Proceedings Act 1956 (the GPA), and the cases of *Haji Abdul Rahman v. Government of Malaysia & Anor* [1966] 2 MLJ 174 and *Steven Phoa Cheng Loon v. Highland Properties Sdn. Bhd., supra* are cited to strengthen the contention.

5.(1) On issue (a), to my mind, on the facts of the case and by reason of the fact that it was not raised as an issue at the trial, it has no force to stop the court from proceeding with the consideration on the merits of the substantive issues in the case for the following reasons:

(i) The plaintiffs based their claims on the rights under the Constitution, the Act and at common law but not under the Code. Under each of these heads, the relevant party has to be the Federal Government as the authority administrating the Constitution, the Act and the party

answerable for claims at common law; and the State Government is a necessary party being the authority pertaining to land in the State and the party which evicted the plaintiffs from the Land. Hence, s. 16(2) of the Code does not apply and the case of *Yee Seng Plantations Sdn. Bhd., supra* which deals with the alienation of land under the Code is distinguished.

(ii) Section 447(1) of the Code provides that in matters relating to procedure not provided for by the Code, the rules of court shall prevail over the Code. On this point O. 15 r. 6(1) of the Rules of the High Court 1980 states:

> No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

The law is clear that a misjoinder of parties, if any, is never fatal by reason of this order (re *Lembaga Arkitek Malaysia v. Cheah Kim Fah & Ors* [1999] 2 CLJ 937 and *Siew Kong Engineering Works v. Kian Yit Engineering Sdn. Bhd. & Anor* [1993] 2 SLR 505 at p. 508).

(iii) The manner the preliminary point is raised is unfair to the plaintiffs. No explanation is advanced as to why the point was not raised at the trial. It is noted that the same learned Selangor State Legal Adviser Dato' Mohd. Zawawi bin Haji Salleh, leading counsel for the 1st defendant appeared for the 9th and 10th defendants in the case of *Steven Phoa Cheng Loon, supra* where the same point was raised by him. This clearly indicates that he knew all along of this point; hence, he was duty bound to raise it at the trial as a matter of fairness to the plaintiffs. It is the usual practice for the issue of parties to be settled at the outset of the trial and not to be brought up by way of surprise at the close of the case.

(iv) The 1st defendant did not plead this point in its defence. It defeats the whole object of pleadings if a party is allowed to spring a surprise and deny notice to the other party on a point it considers material to its case. The object of pleadings is set out by Buhagiar J in *Wong See Leng v. C. Saraswathy Ammal* [1954] MLJ 141 (quoting Bullen and Leake's *Precedents of Pleadings*, 10th edn., at p. 1), in particular, to give to each of the parties distinct notice of the case intended to be set up by the other and this to prevent either party from being taken by surprise at the trial. This is related to the principle that the parties are bound by their pleadings, which means that the court is not entitled to decide

on a matter which is not pleaded (re *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330). Further, a fundamental rule of natural justice is the right to be informed of any adverse point so that one has the opportunity of stating the answer (re *Muniandy & Anor v. Muhammad Abdul Kader & Ors* [1989] 2 CLJ 577; [1989] 1 CLJ (Rep) 116).

(v) The preliminary point is really in the nature of a preliminary objection. Hence, it was incumbent on the 1st defendant to have given written notice to the plaintiffs of its intention to raise the issue, failing which it is deemed to have waived the objection (re *Bukit Melita Sdn. Bhd. v. Lam Geok Hee & 7 Ors* [1997] 4 AMR 3160 at p. 3163).

(vi) There is an inordinate delay in raising the preliminary point which is fatal (*Re Pekan Nenas Industries Sdn. Bhd. v. Chang Chin Chuen* [1998] 1 MLJ 503 and *Bullock v. London General Omnibus Company* [1907] 1 KB 264 at p. 270).

(vii) In the case of *Dewan Undangan Negeri Kelantan v. Nordin bin Salleh* [1992] 2 CLJ 1125; [1992] 1 CLJ (Rep) 72 in a claim for declaration of rights the Federal Court held that if a party who claims that he is the right party to the suit stands by and does nothing although aware of the suit he is as much bound by the decision as a party to the case. Hence, in this case if the Selangor State Director of Lands and Mines was of the view that he ought to be the proper party to be sued it was always open to him to raise an objection through the State Government. It is highly unlikely that he was not aware of the proceedings because the State Government was represented by the State Legal Adviser throughout the proceedings.

(viii) The plaintiffs are entitled to rely on the principle that a party is bound by the manner it has pleaded and conducted its case in court, that is to say, the doctrine of estoppel in litigation, as observed by the Federal Court in *Lai Yoke Ngan v. Chin Teck Kwee* [1997] 3 CLJ 305. In the case before me, after having conducted the case on the basis that the Kerajaan Negeri Selangor is properly a party and cross-examining the plaintiffs' witnesses on its behalf, the 1st defendant should not now be allowed to reverse its stand and claim that it should never have been a party. Having had the opportunity of objecting to being made a party and failing to object, the 1st defendant is now precluded from changing course.

(2) In respect of issue (b), in my view, the contention holds water notwithstanding that the point was not pleaded in the defence but raised at a late stage. This point, being substantive, stands on a different footing from issue (a) by reason of the concept of vicarious liability under common law imposed by the GPA on the government, that is to say, before the government can be held liable for trespass committed by its servant it must be proved that the servant has committed trespass. If he is not liable then the government is also exempted from liability. Section 5 of the GPA provides:

> **5. Liability of the Government in Tort**
>
> Subject to this Act, the government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

Section 6(1) states:

> **6. Limits of liability of the Government**
>
> (1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally:

Section 6(4) reads:

> (4) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless that officer was at the material time employed by the Government and paid in respect of his duties as an officer of the Government wholly out of the revenue of the Government, or any fund certified by the appropriate financial officer for the purposes of this subsection or was at the material time holding an office in respect of which the appropriate financial officer certifies that the holder thereof would normally be so paid.

And s. 18 provides:

> **18. Application of written law relating to procedure.**
>
> Subject to this Act, the written law relating to procedure shall apply to civil proceedings by or against the Government in the same way as to suits between subject and subject.

These provisions require that the identity of the officer must be ascertained and the liability of the officer must be established before the government can be made liable. However, if I am wrong in this respect, at least the point is relevant for the purpose of determining the issue of trespass and unlawful eviction, as alleged, in the light of the evidence adduced, which will be discussed later.

6.(1) Now, I will deal with the substantive claims of the plaintiffs. The plaintiffs contend that the notices are unlawful and that the entry of the defendants onto the land to demolish their houses and destroy the crops thereon and deprive their continued occupation of the land is an act of trespass. The claims are based on their rights at common law, statutory law and under the Constitution.

(2) At common law, they claim as owners by custom, native title and the holders of usufructuary right over the land. They contend that the land was customary and ancestral land occupied by them and their forefathers for generations. Hence, they have customary and proprietary rights in and over the land.

(3) Under statutory law, they claim the protection of the Act and that both under the Act and the Constitution, the 1st and 4th defendants as governments, owe a fiduciary duty towards them to protect their welfare and the land and are therefore, holding the land as trustees for them.

(4) And under the Constitution they claim:

(i) that by reason of their customary and proprietary rights over the land from time immemorial the land is classifiable as 'Malay reservation land' within the wide meaning of the expression in art. 89(6) of the Constitution. Therefore, the land is protected land;

(ii) that the 4th defendant is under a positive duty under art. 8(5) of the Constitution read together with the Act and art. 162 of the Constitution to take appropriate steps to protect the land rights of the orang asli including to positively discriminate in their favour, if necessary, that is to say, to have taken appropriate measures to protect all aboriginal inhabited lands in question and that it cannot now take advantage of its own default and contend that the lands are unprotected lands;

(iii) that after the coming into force of the Constitution in 1957, any compulsory acquisition or taking of such lands can only be made pursuant to written law with adequate compensation under art. 13 of the Constitution; and

(iv) that ss. 11 and 12 of the Act are *ultra vires* the Constitution, in that they offend art. 13 because they fail to provide for adequate compensation and against art. 8 in that there is discrimination in terms of process and compensation as between the acquisition of aboriginal land and acquisition under the LAA.

In the alternative, the provisions of the Act as pre-Merdeka law ought to be read under art. 162 in conformity with arts. 13 and 8 of the Constitution.

7. On the other hand, the 1st defendant denies that the notices are unlawful and that a trespass had been committed since the entry and the taking of possession of the land was done according to law. It also denies that the plaintiffs are owners by custom, native title and the holder of usufructuary right over the land. On the contrary, it asserts that whatever occupation of the lands by the plaintiffs in the area concerned was only authorised in accordance with the Federated Malay States Government Gazette Notification (N.M.B. Selangor P.U. 1649/1935) and the right was given only for the purpose of residence and settlement but not at all the rights as claimed. Further, it denies owing any fiduciary duty towards the plaintiffs as alleged. However, if at all the duty exists the duty had been performed accordingly to the existing laws. The 4th defendant proceeds more or less on similar defence and asserts that all steps had been taken to protect the rights, interests and welfare of the orang asli and to enhance their wellbeing. The plaintiffs' claim against the 2nd and the 3rd defendants is limited to damages for trespass. The 2nd defendant claims to be the agent of the defendants and purports to seek shelter for all its actions under the authority of the Selangor State Authority, which is the legal owner of the land; whilst the 3rd defendant denies liability for trespass based on the fact that it is not the decision maker in respect of the acquisition of the land and other matters relating thereto, and that its involvement during the eviction is merely by the presence of its agent thereat.

8.(1) An aborigine is defined in s. 3 of the Act to mean:

(a) any person whose male parent is or was, a member of an aboriginal ethnic group, who speaks an aboriginal language and habitually follows an aboriginal way of life and aboriginal customs and beliefs, and includes a descendant through males of such persons;

(b) any person of any race adopted when an infant by aborigines who has been brought up as an aborigine, habitually speaks and aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and is a member of an aboriginal community; or

(c) the child of any union between an aboriginal female and a male of another race, provided that the child habitually speaks an aboriginal language, habitually follows an aboriginal way of life and aboriginal customs and beliefs and remains a member of an aboriginal community.

Under s. 2, an aboriginal ethnic group means a distinct tribal division of aborigines as characterised by culture, language or social organisation and includes any group that the State Authority may, by order, declare to be an aboriginal ethnic group. And an aboriginal community means the members of one aboriginal ethnic group living together in one place.

The defendants recognise the plaintiffs as aboriginal Temuan people but challenge the fact as to whether they still continue to practice their Temuan culture. Therefore, the onus is on the plaintiffs to show that they speak an aboriginal language, follow an aboriginal way of life as well as aboriginal customs and beliefs.

(2) Evidence has been led to show the existence of a tribal council called the 'Lembaga Adat' from previous generations until the present day. It consists of five persons with specific roles and authority, namely the Batin who is the head of the whole community and is the highest authority, the Penghulu Balai who is the keeper of the Temuan culture, the Jenang who is the person that conducts and sanctions marriages in the community, the Jekerah who directs communal activities and the Pelima who is the watchdog against social ills and for peace in the community. It meets at the Balai Adat to resolve disputes and settle all matters relating to the adat (see the evidence of PW1, PW2 supported by the writings of Dr. Baharom Azhar bin Rafie'i, the former Director-General of the JHEOA in exh. P24 at pp. 245 and 267 and agreed to by DW7, the current Deputy Director-General of the JHEOA, the writings of Ahmad Ismail in exh. P24 from pp. 162 to 173 and the unchallenged expert evidence of PW7 at para. 79 in exh. P24 at pp. 17-18). Hence, it is manifestly evident that the Temuan people of Kampong Bukit Tampoi live in an organised society, with a system of adjudicating disputes, governed by their laws and customs and that they still practice a specific political system according to their culture with specific persons to hold offices that had been passed down from generation to generation. The plaintiffs also adduce evidence in respect of other essential matters, that is to say, their culture relating to land (adat tanah) and burial (adat kebumian), their religion or belief system, their community weapon, ie, the blowpipe (sumpitan), their tradition of sekor-menakor, their personal and place-names, their custom on inheritance, their traditional activities and their aboriginal language. On adat tanah, the opening of land is preceded by specific rituals called "adat tiga penjuru" in which the help of the spirits are invoked and homage to the spirits paid. The lands within the communal territory had been individually delineated by their forefathers

as clearly-defined family lots having the force of property and ownership in their culture. Each individual lot is demarcated by traditional markers, such as the pinang palm or specific fruit trees or by geographical features, such as rivers and streams and these boundaries are invariably recognised by all in the community. The inheritance to the respective parcels of land is determined according to the adat and the distribution is resolved by the Lembaga Adat on the 7th day following the death of the land owner (see the evidence of PW1, PW2 and PW3). With regard to adat kebumian, the plaintiffs bury the dead according to their distinct custom. Briefly, the deceased must be buried within the following day of the death and that the deceased's clothings, valuables and basic necessities must be kept at the burial site. Food is left in a specially-built altar (sangkar) as the belief is that the deceased will rise up and eat the food. A 'sungkun' will be built wherein the incense (kemenyan) will be burnt. The Penghulu Balai will then invoke the spirits (serapah) and the relatives will be asked to call the spirit of the deceased. He will then take a bunch of leaves and after calling the deceased he will tell the deceased's spirit that the site is its home forever. The Pelima will burn the incense according to the adat and pray for the soul. Once the body has been lowered into the grave a palm frond is used six times to cushion the falling earth onto the body. Rice is then thrown on the grave at the same time telling the deceased that the food is for him. A white ribbon is then stretched across the grave with a square centre which must lie directly above the centre of the deceased's body and the original top soil replaced. Those returning from the grave-site will have to jump across a line that has been stretched across the path by someone who does not attend the funeral. The returnees are also required to beat a broken cooking pot (kuali) placed thereat. At the same time the person who has not been to the grave-site must throw soaked rice at the returning mourners. This is done to scare the spirit of the deceased from following them back to the village. On the third day, the family returns to the grave for the 'naik tanah' ceremony where food is again offered and prayers said. Then, on the seventh day, a meeting will be held usually at the Balai Adat presided by the Batin to distribute the property of the deceased including land (see the evidence of PW1 and the relevant photographs). On religion or belief system, in essence, it revolves around the belief in a supreme diety and in the existence of 'Moyangs' who act as intermediaries between the supreme diety and the living. The Temuans also believe that every living being is imbued with a spirit (roh) and needs to be appeased. Moyangs are the spirit beings that their ancestors are transformed into upon death. They watch over the community and their traditional lands, and are referred to as 'penunggu'. The Moyangs are not worshipped but are revered and often called upon to protect or help the community including their health, such as, to chase the rain away by a ceremony conducted by the Penghulu Balai. For that reason, the dead is buried within the vicinity of the village. The Temuans need to

visit the graves regularly in order to conduct the ceremonies to appease and pay homage to their Moyang-protectors. The Moyangs are very site-specific in that they do not travel from one territory to another. Temuan religion is distinct and unique to themselves in the sense that they do not believe in or practice any of the religions of the other Malaysians (see the evidence of PW1 and PW7 in exh. P24 paras. 81, 82 and 83, and the 1984 study by Ahmad bin Ismail on Kampung Bukit Tampoi at p. 194 of exh. P24). In respect of the community weapon, the blowpipe has several terms to describe the various parts such as temiang, telak, tengkok, ipoh and damak. It is produced locally and the damak is made from 'pokok serdang'. It is used by adults and children for hunting small animals, self-protection and to chase intruders away (see the evidence of PW1 and PW3). By the tradition of sekor-menakor as practised by the Temuans, the customs (adat) handed down from one generation to another cannot be abandoned and that if anyone breaks the adat the person can be expelled from the community (dipulaukan) (see the evidence of PW1). On their personal and place-names, the names are derived from incidences or events that occurred during the respective infancy, for example, Dabak (PW1) got his name because he had bruises (debam) all over his body and Sagong (PW3) because he cried noisily (macam gong). Bukit Tampoi got its name from the forest fruit called Tampeh and Dengkil from the thin or shallow flesh of the Tampeh fruit (see the evidence of PW1, PW3, and PW7 in exh. P24 para. 58). With regard to custom on inheritance, only the children of the deceased can inherit (see the evidence of PW1, PW2, PW3 and PW9). On traditional activities, the Temuans used the self-made wooden boats as means of transport along the Langat River, fished in the river using fishing spear (tirok) made from penaga tree and used the 'tuba' obtained from the old cengal tree as poison to stupefy the fish in the river. The skill of boat-making and the boat-making tools had been passed down to the present day, and the spear-head and the remains of the trees are still in existence (see the evidence of PW3 and PW9, exhs. P7, P8, P9, P10, P11, P12, P23 and the photographs in exhs. P4 and P5). In relation to the aboriginal language, the Temuan community at Kampung Bukit Tampoi have a distinct language of their own, that is to say, the Temuan language which they still use today. There is no written script of their own but the language is passed down by word of mouth through the generations dated back to the pre-literate period (see the evidence of PW7, exh. P24 para. 44 at pp. 9, 10, 222-225 and 269-278). This fact is not challenged by the defence and no evidence to the contrary adduced. The fact that the plaintiffs spoke Temuan as their first language and that a Temuan interpreter was required to facilitate the translation of the questions and answers during their testimony is self-evident.

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(3) In view of the foregoing, I am satisfied that the plaintiffs belong to an organised society, following an aboriginal way of life, practising customs and beliefs and having their own Temuan language which they use to the present day. Therefore, the plaintiffs belong to an aboriginal society within the meaning of the Act. To my mind, the facts that:

(a) they no longer depended to forage for their livelihood in accordance with their tradition,

(b) they cultivate the lands with non-traditional crops such as palm oil,

(c) they also speak other languages in addition to Temuan language,

(d) some members of the family embrace other religion, and/or marry outsiders,

(e) some family members work elsewhere either before or after the acquisition, and

(f) the Jawatankuasa Kemajuan dan Keselamatan Kampung (JKKK) was set up by the JHEOA to manage their affairs

do not change their origin. The election of Tukas anak Siam (PW2) as Batin by the JKKK after his appointment by the Lembaga Adat should not be construed as an abandonment of their adat because it was held for administrative purpose only. Further, s. 3(2) of the Act preserves their ethnic identity, which reads:

> Any aborigine who by reason of conversion to any religion or for any other reason ceases to adhere to aboriginal beliefs but who continues to follow an aboriginal way of life and aboriginal customs or speaks an aboriginal language shall not be deemed to have ceased to be an aborigine by reason only of practising that religion.

9.(1) About the land, whether the plaintiffs have proved that the Bukit Tampoi lands are customary and ancestral land belonging to the Temuan and occupied by them for generations.

(a) Evidence has been adduced of the settlement of Temuans in Bukit Tampoi. The plaintiffs and the Temuans have lived in Bukit Tampoi, Dengkil for at least seven generations, that is to say, about 210 years based on Professor Khoo Kay Kim's (DW6's) testimony that a generation is 30 years (to be amplified later). Kampung Bukit Tampoi is part of the area identified in various historical journals and authoritative texts which came under the administrative jurisdiction of Sepang, Kuala Langat and Dengkil districts at various times (see paras. 26, 34 and 37 of exh. P24). According to PW7 from the documents in the archives, Kampung Bukit Tampoi was

already in existence at least 100 years ago and from his research into other authoritative texts as well as from interviews with elders thereat he opined that Kampung Bukit Tampoi has an even longer history of settlement and residence (see also para. 140 in exh. P24). There is also archival evidence indicating the early settlement of the orang asli in Bukit Tampoi lands, such as the letter from the District Officer of Kuala Langat dated 30 March 1896 concerning 'sakai' (now called Temuan) dusuns and lands. At paras. 1 and 2 it is mentioned that the 'sakai' dusuns are strictly reserved for their use and that the dusuns are in small patches all over the forest (see para. 25 in exh. P24 and Ikatan C at p. 17). Based on an archival document dated 26 November 1896 in which the District Officer of Kuala Langat wrote about the jungle produce collected by sakais, PW7 testified that the orang asli were actively involved in collecting and trading in forest produce such as rattan more than 100 years ago (see para. 27 in exh. P24 and Ikatan C at p. 19). In another archival document dated 16 March 1936, the Selangor State Adviser of Forests mentioned of orang asli living in the forest reserve in Kuala Langat and that they were growing rubber (see para. 30 in exh. P24 and Ikatan C at p. 4). In the Selangor Secretariat document No. 675/48 relating to the discussion on Sakai Reserves and Sakai Headmen, the District Officer of Kuala Langat had written that there were altogether 16 settlements in his district, of which seven were gazetted and the rest were not (see para. 31 in exh. P24 and Ikatan C at p. 15). According to PW7 based on the same document where it was recorded that there were 11 headmen (Batin) for the 16 orang asli settlements in the district, the orang asli were living as a community with their own headmen and that the British recognised the appointments (see para. 32 in exh. P24 and Ikatan C at p. 16). The early presence of the orang asli in the Kuala Langat area is further supported by the 1906 publication by Messrs Skeat and Blagden at p. 38 of volume one (see at pp. 89-106 in particular at p. 100 in exh. P24) where the breakdown of the Aborigines in Selangor, including that of Kuala Langat district was given which shows that the highest number of orang asli was found in Kuala Langat (see para. 28 in ex. P24). In fact, in the JHEOA report entitled *'A Brief Note On The Orang Asli Of Peninsular Malaysia And Their Administration'* of 1972, the Temuans have been depicted to be the largest of the Proto-Malay tribes and that the great majority of them lived in Selangor and Negeri Sembilan (see para. 29 in exh. P24 and Ikatan C at p. 86). On the evidence, I am satisfied that the Temuans were settled people and that the Bukit Tampoi lands were occupied by them long prior to the acquisition.

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(b) Evidence has also been adduced of the fact that the Temuans including the plaintiffs have been living at Kampung Bukit Tampoi for at least sseven generations. PW3 (the 1st plaintiff) testified that he is the son of Tasi, the grandson of Batin Pa' Lapan, had been living at Kampung Tampoi all his life and that he inherited his land (marked as C in exh. P1) from his father. It is also not disputed that Batin Pa' Lapan was succeeded by his son Batin Endek who in turn was succeeded by his nephew, Batin Tukas anak Siam (PW2 the 7th plaintiff). Based on these facts, PW7 concluded that since PW3 is the grandson of Batin Pa' Lapan and he himself has grandchildren living with him that would mean that at least five generations of Temuans had lived at Kampung Bukit Tampoi from Batin Pa' Lapan's time and considering that two other predecessors of Batin Pa' Lapan had also lived there, that is to say, Batin Pa' Gurau and Batin Mongkok at least seven generations of Temuans had lived there (see para. 45 in exh. P24). The life and person of Batin Pa' Lapan is also corroborated by the document from the then Museums Department, Federation of Malaya acknowledging the donation of an aboriginal spear from Batin Pa' Lapan (see Ikatan B at p. 106). From the letter of 18 February 1955 in Ikatan B at p. 105 which states that Batin Pa' Lapan lived on his own land with his aboriginal group at Bukit Tampeh near Dengkil and that the Department of Aborigines was responsible for him and his people on behalf of the government, PW7 opined that the Federal Adviser on Aborigines (the predecessor of the Director-General of JHEOA) recognised that the land the aboriginal group was living on belonged to them supporting the fact that the Temuans at Kampung Bukit Tampoi lived as a community and that Batin Pa' Lapan's position was an official one and that the Colonial Government assumed a fiduciary responsibility towards him (see paras. 46, 47 and 48 in exh. P24). PW3 testified that the original name of Kampung Bukit Tampoi was Bukit Tampeh. And according to PW7 Bukit Tampeh refers to Bukit Tampoi and that the aboriginal group that lived at Bukit Tampeh is the same Temuan community of Kampung Bukit Tampoi today (see para. 37 in exh. P24). The existence of Batin Pa' Lapan is further corroborated by the following facts and documents:

(i) The Selangor Secretariat document No. 675/1948 in which the District Officer of Kuala Langat made reference to Batin Pa' Lapan and stated that the District Office had never taken any hand in the election of the headmen (see Ikatan C at p. 16),

(ii) the group photograph in which Batin Pa' Lapan appeared (re Ikatan B at p. 107). PW7 stated that given his status as overall Senior Headman of all the Orang Blandas in Selangor then, Batin Pa' Lapan

must have been above 50 years of age at the time when the documents in Ikatan B at pp. 104 and 105 mentioning him were made in 1949 and 1955, respectively (see para. 38 in exh. P24). According to PW7, 'Orang Blandas', like other terms such as 'Mantra' and 'Biduanda' is a term used to refer to the Temuan people (see para. 35 in exh. P24). Dr. Baharom, the former Director-General of the JHEOA, in his doctoral dissertation speaks the same (re exh. P24 at pp. 233-234), and

(iii) the locations marked H2 and H3 in exh. P1 as the graves of PW3's ancestors including that of Batin Pa' Lapan as shown in the photograph in Ikatan B at p. 114 marked as exh. P7(A) (see the Notes of Evidence at p. 28).

Further support to the claim that Kampung Bukit Tampoi was already an established orang asli settlement at least half a century ago can be gathered from the 1950 archival document relating to the Schedule of Aborigines Settlements in Ulu Langat (re Ikatan C at p. 42) which recorded that 50 families were living in Kampung Bukit Tampoi then and that there was a need for a school thereat. To my mind, the recognition by the authorities of the need of a school then is a clear indication that Kampung Bukit Tampoi was, prior to 1950, already a settled and established community. The evidence adduced has not been contradicted. Hence, I am satisfied that the Temuans including the plaintiffs have been living at Kampung Bukit Tampoi for at least 210 years.

(c) It is evident that the Bukit Tampoi lands, including the land were customary and ancestral lands based on (i) the adat of inheritance and succession of lands (ii) their usages for dwelling purposes and cultivation of subsistence and economic crops, hunting and fishing, as resting places of their deceased members of the communities and to practice their way of life and (iii) the recognition of individual or family ownership thereto not only by all the members of the local community, all other neighbouring Temuan communities, all neighbouring non-orang asli communities but also by the authorities without any dispute except for the acquisition. It is also clear that the Bukit Tampoi lands including the land are customary lands by reasons of (i) the existence of graves of the ancestors thereat and the importance of the Moyangs to the Temuans, (ii) the existence of evidence on the Bukit Tampoi lands that confirms the presence of the community thereat and that they used the area for their daily activities for ages. Such evidence is the old cengal tree from which the poison (tuba) was extracted for fishing purposes and the remains of the penaga tree from which the fishing spear (tirok) was made, (iii) the existence of the names for specific places thereat and its vicinity such as Bukit Tampoi, Dengkil, Bergul, Batik Abok, Binyai and Panggol which

originated from the Temuans' spoken language (see the evidence of PW7 at para. 59 in exh. P24 and PW3), (iv) the existence of Balai Adat on the Land before the acquisition which is another culturally significant monument of the distinctive Temuan culture (see exh. P1 marked II) and (v) the archaeological findings of PW8 relating to an old iron spear head and its age (exh. P9) and the wooden boat (see at pp. 85-86 of the Notes of Evidence and the evidence of PW3 at p. 29 of the same, who claimed to have found exh. P9 and exh. P13 (pisau meraut) thereat).

(2) In the final analysis, I conclude that:

(a) the Bukit Tampoi lands including the land have been occupied by the Temuans including the plaintiffs for at least 210 years and the occupation was continuous up to the time of the acquisition,

(b) the plaintiffs had inherited the land from their ancestors through their own adat,

(c) the Temuans who are presently occupying the Bukit Tampoi lands including the plaintiffs in respect of the land are the descendants of the Temuans who had resided thereat since early times and that the traditional connection with Bukit Tampoi lands have been maintained from generation to generation and the customs in relation to the lands are distinctive to the Temuan culture, and

(d) the Bukit Tampoi lands including the land are customary and ancestral lands belonging to the Temuans including the plaintiffs and occupied by them for generations.

10. Before proceeding with the law, I need to deal briefly with the following matters:

(a) PW7, Dr. Collin Nicholas gave expert evidence on the Temuan practices, customs, culture, traditions, political system and their way of life including those of the Temuan community at Kampung Bukit Tampoi. Unfortunately, no challenge to his expertise was made before he was called to testify. Be that as it may, judging from his credentials and testimonies relating to his fieldwork, research, studies, publications and presentations as deposed in his affidavit (exh. P24) I accept him as an expert. However, in accepting his evidence I adopt a cautious approach because he is deeply involved with and active in the welfare of the orang asli, though not completely biased. His evidence can be relied upon because to a great extent it is supported by the evidence of other lay witnesses called by the plaintiffs and also based on the published works of other writers, which are not hearsay but admissible under s. 45 of the Evidence Act 1950 (the EA) (re *R v. Abadom* [1983] 1 All AER 364 and *Sarkar's Law of Evidence* (15th edn.) at p. 884).

(b) On whether oral histories of the Temuans relating to their practices, customs and traditions and on their relationship with the land can be accepted, please see my ruling made during the trial as in Appendix A. The acceptance of evidence is confined to the Ruling.

11.(1) The common law recognises a form of native title which reflects the entitlement of the aboriginal people, in accordance with their laws and customs, to their traditional lands. The aboriginal people's right over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself (in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein) since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial. In Malaysia the recognition was affirmed by the High Court in the case of *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 and confirmed by the Court of Appeal in the case of *Kerajaan Negeri Johor & Anor v. Adong bin Kuwau & Ors* [1998] 2 CLJ 665 (both are hereinafter referred to as 'the *Adong* case'). It was held that the aborigines' common law rights include, *inter alia*, the right to live on their land as their forefathers had lived and this would mean that even the future generation of the aboriginal people would be entitled to this right of their forefathers, and further, that the Act does not exclude rights vested in the aboriginal people at the common law. The decision in the *Adong* case was influenced by the persuasive authority of the Canadian case of *Calder v. A-G of British Colombia* [1973] 34 DLR (3d) 145 (hereinafter referred to as 'the *Calder* case') and the Australian cases of *Mabo & Ors v. State of Queensland & Anor* [1986] 64 ALR 1, *Mabo v. Queensland* [1991-1992] 175 CLR 1 (hereinafter referred to as *'Mabo No. 2'*) and *Pareroultja & Ors v. Tickner & Ors* [1993] 117 ALR 206. The *Adong* case is concerned with the deprivation of vast areas of the aborigines' traditional and ancestral land on which they did not stay but depended to forage for their livelihood in accordance with their tradition. However, in the case before me the acquisition is in respect of a small portion of their traditional and customary or ancestral land where they resided, that is to say, their settlement. I follow the *Adong* case, and in addition, by reason of the fact of settlement I am of the opinion that based on my findings of facts in this case, in particular on their culture relating to land and their customs on inheritance, not only they have the right over the land but also an interest in the land. I am fortified in my view by the leading Privy Council case of *Amodu Tijani v. The Secretary, Southern Nigeria* [1921] 2 AC 399 (hereinafter referred to as 'the *Amodu* case'), which was relied on by the High Court in the *Adong* case though the issue of settlement did not arise in the case. The issue in the *Amodu* case was whether the native people whose land was taken for a public purpose ought to be compensated on the basis of

ownership of the land or merely on the basis of having a right of control and management of the land. In ruling that compensation should be on the basis of full ownership, the Privy Council observed (at p. 403-404):

> The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment *inter vivos* or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a *priori* are of but little assistance, and are as often as not misleading.

The Privy Council had cautioned against interpreting native title by reference to the English land law principles (at p. 403) and in *Mabo No. 2* Brennan J administered the same caution (at p. 29). Accordingly, the Privy Council relied upon a report on the character of the tenure of land among the native communities in West Africa which stated that all members of the native community had an equal right to the land although the headman or the head of the family had charge of the land and in loose mode of speech is sometimes called the owner who held the land for the use of the community or family and the land remained the property of the community or family. The same can be said of the character of land tenure and use amongst the Temuan people based on the facts as found. Further, the character of proprietary interest of the aboriginal people in their land as an interest in land and not merely an usufructuary right can be gathered from the following features of native title as decided by the courts:

(a) it is a right acquired in law and not based on any document of title (see the *Calder* case, followed in the *Adong* case at p. 428F),

(b) it does not require any conduct by any person to complete it nor does it depend upon any legislative, executive or judicial declaration (see Brennan CJ in *The Wik Peoples v. The State of Queensland & Ors* [1996] 187 CLR 1 (hereinafter referred to as '*The Wik Peoples* case') at p. 84, followed in the Malaysian case of *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn. Bhd. & Ors* [2001] 2 CLJ 769 at p. 780),

(c) native title is a right enforceable by the courts (see Brennan CJ in the *Wik Peoples* case at p. 84),

(d) native title and interest in aboriginal land is not lost by colonisation, instead the radical title held by the Sovereign becomes encumbered with native rights in respect of the aboriginal land (see *Mabo No. 2*, headnotes at p. 2),

(e) native title can be extinguished by clear and plain legislation or by an executive act authorised by such legislation but compensation should be paid (see *Mabo No. 2*, headnotes at p. 3), and

(f) the aboriginal people do not become trespassers in their own lands by the establishment of a colony or sovereignty (see *Ward & Ors (on behalf of the Miriuwung and Gajerrong People) & Ors v. State of Western Australia & Ors* [1998] 159 ALR 483 at p. 498 lines 43-45).

The aforesaid principles of native title were adopted in the current leading cases on the subject in Australia and Canada *viz. Mabo No. 2*, *The Wik Peoples* case, and *Delgamuukw v. The Queen in right of British Columbia et al; First Nations Summit et al., Interveners* [1997] 153 DLR (4th) 193 (hereinafter referred to as 'the *Delgamuukw* case') which hold that the aboriginal people's rights included an interest in the land and not merely an usufructuary right. The position is the same in the United States of America from the time of the case of *Johnson and Graham's Lessee v. William M'Intosh* [1823] 21 US 681 at p. 688 where Marshall CJ said:

> They (Indian tribes or nations) were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion.

(2) My view is that, although I am inclined to wear blinkers in considering the issues involved in this case by confining only to our existing laws and local conditions, I am compelled not to be blinkered by the decisions of the courts of other jurisdictions which deserve much respect, in particular on the rights of the aboriginal people which are of universal interest, especially when there is no clear and plain indication to the contrary in our laws. In fact, the Court of Appeal in the *Adong* case had accorded much respect to those decisions of the courts of other jurisdictions when it agreed with the views expressed by the learned judge based also on the decisions of the courts of other jurisdictions for the same reason, where Gopal Sri Ram JCA held:

> We can find nothing objectionable in the foregoing passages. Indeed, we entirely agree with the views expressed by the learned judge in his judgment upon the issue of liability. Those views accord with the jurisprudence established by our courts and by the decisions of the courts of other jurisdictions which deserve much respect. It is now settled beyond argument in our jurisdiction that deprivation of livelihood may amount to deprivation of life itself and that state action which produces such a consequence may be impugned on well-established grounds.

Although the *Adong* case purported to follow *Mabo No. 2* it did not consider that an essential character of aboriginal title to the land as described by the High Court of Australia was a proprietary interest in the land itself. Brennan J (as he then was) explained it as follows:

> Whether nor not land is owned by individual members of a community, a community which asserts and asserts effectively that none but its members has any right occupy or use the land **has an interest in the land that must be proprietary in nature:** there is no other proprietor. It would be wrong, in my opinion, to point to the inalienability of land by that community and, by importing definitions of "property' which require alienability under the municipal laws of our society (39), **to deny that the indigenous people owned their land. The ownership of land within a territory in the exclusive occupation of a people must be vested in the people:** land is susceptible of ownership, and there are no other owners ...;

His Lordship went on to explain that although aboriginal title was a community title belonging to the community as a whole, individuals within the community could by its laws and customs possess proprietary individual rights over their respective parcels of land, as follows:

> Indeed, it is not possible to admit traditional usufructuary rights without admitting a traditional proprietary community title. There may be difficulties of proof of boundaries or of membership of the community or of representatives of the community which was in exclusive possession, but those difficulties afford no reason for denying the existence of a proprietary community title capable of recognition by the common law. That being so, there is no impediment to the recognition of individual non-proprietary rights that are derived from the community's laws, and customs and are dependent on the community title. **A *fortiori,* there can be no impediment to the recognition of individual proprietary rights**.

The *Adong* case was decided at the time when the *Calder* case was the leading Canadian authority. It was decided before the landmark decision of the Canadian Supreme Court in the *Delgamuukw* case; and it appears from the judgment as reported, the case of *Canadian Pacific Ltd. v. Paul et al.; Attorney-General of Ontario, Intervener* [1988] 53 DLR (4th) 487 (hereinafter referred to as 'the *Canadian Pacific* case') was not cited before it. Therefore, it is evident that the *Adong* case did not take into account the important developments and clarifications made to aboriginal title by Canadian case-law after the *Calder* case. In the *Canadian Pacific* case the Supreme Court said of aboriginal interest in land that "… it is more than the right to enjoyment and occupancy" (at p. 505). And in the *Delgamuukw* case, the Supreme Court specified that the content of aboriginal title is a right in land, when it held:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. (per Lamer CJ at p. 240).

This statement was made in refuting the argument by the government that the aboriginal title is no more than a bundle of rights to engage in activities or the right to exclusive use and occupation of land. And Lamer CJ went to explain that because the aboriginal title is a right in the land itself it cannot be limited to use only for activities which are traditionally aboriginal activities. He said:

> ... aboriginal title differs from other aboriginal rights in another way. To date, the Court has defined aboriginal rights in terms of activities. As I said in *Van der Peet* (at para. 46):
>
> > …in order to be an aboriginal right an activity must be an element of practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.
>
> **Aboriginal title, however, is a right to the land itself.** Subject to the limits I have laid down above, that land may be used for a variety of activities, none of which need be individually protected as aboriginal rights under s. 35(1). Those activities are parasitic on the underlying title.

Since the establishment of the Selangor sultanate in 1766, it was claimed that all lands in the State belonged to the Sultan, including those occupied by the aboriginal people since time immemorial. In general, the aboriginal people occupied the lands in the hinterland in an organised society, though some were nomadic. Although the Sultan owned the lands they were left undisturbed to manage their affairs and way of life thereon in accordance with their practices, customs and traditions except in respect of those lands which attracted activities to enrich the privy purse, such as tin mining etc. In my view, if now the aboriginal people are to be denied of the recognition of their proprietary interest in their customary and ancestral lands it would tantamount to taking a step backward to the situation prevailing in Australia before the last quarter of the twentieth century where the laws, practices, customs and rules of the indigenous peoples were not given recognition, especially with regard to their strong social and spiritual connection with their traditional lands and waters. The reason being that when a territory was colonised by the whites it was regarded as practically unoccupied, without settled inhabitants or settled land, an empty place, desert and uncultivated even though the indigenous peoples had lived there since time immemorial because they were regarded as uncivilised inhabitants who lived in a primitive state of society. However, *Mabo No. 2* changed the position and since then there had been a flurry of state and federal legislation relating to native title. Brennan J in his reasoning referred to international human rights norms. He said:

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisaiton of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.

(3) Therefore, to be in keeping with the worldwide recognition now being given to aboriginal rights I conclude that the proprietary interest of the orang asli in their customary and ancestral lands is an interest in and to the land. However, this conclusion is limited only to the area that forms their settlement but not to the jungles at large where they used to roam to forage for their livelihood in accordance with their tradition. As to the area of the settlement and its size it is a question of fact in each case. In this case as the land is clearly within their settlement I hold that the plaintiffs' proprietary interest in it is an interest in and to the land.

12. With regard to their statutory rights, it was affirmed and confirmed in the *Adong* case (which was concerned with the aboriginal inhabited place) that the Act does not limit the aborigines' rights therein and in order to determine the extent of the aboriginal peoples' full rights under the law, their rights under the common law and the statute has to be looked at conjunctively, for both the rights are complementary, and the Act does not extinguish the rights enjoyed by the aboriginal people under the common law. This is what Mokhtar Sidin J (as he then was) said leading to the affirmation:

> Recognising these rights of the aboriginal people, the government enacted the Aboriginal Peoples Act 1939 which is 'an enactment for the protection of the aboriginal tribes of Perak'. In the same year, this enactment was extended to the states of Selangor, Negeri Sembilan and Pahang which were then known as the Federated Malay States. The Aboriginal Peoples Act was amended in 1954, 1967 and lastly in 1974.
>
> Sections 6 and 7 of the Act specifically provide for the creation of special areas exclusively for the aboriginal peoples of Malaya, either as a reserve land or for the right to collect the produce of the jungle and to be used by hunting grounds. By virtue of s. 1, the rights of the aboriginal peoples to occupy and/or collect forest produce overrides Malay reserve land, forest reserve or game reserve. Section 10 reflects the legislature's intention to allow the aboriginal people to lead the type of life they have always led, which has been nomadic and always looking for greener pastures. Under s. 11, the State Authority must pay compensation when acquiring by alienation or leasing any land upon which are fruit and rubber trees claimed by the aboriginal people.

> These people live from the hunting of animals in the jungle and the collection of jungle produce. Those are the only source of their livelihood and income. Can these rights be taken away by he government without compensation? At a glance this could be done, but upon looking further and deeper, it is my opinion that compensation ought to be made. This can be discerned from s. 11 of the Act, which guarantees adequate compensation for the land, bearing rubber or fruit trees claimed by the aboriginal people, that is alienated. It is clear to me that the land on which those trees are planted is either a reserve land for the aboriginal people or an area where they had a right to access, which is a jungle reserve. In the first case, there is no problem because it is their reserved land. In the second case, it is clear that the land belongs to the state but they were planted by the aborigines. As such, adequate compensation must be made for these trees but not for the land. In the present case, I am of the view that adequate compensation for the loss of livelihood and hunting ground ought to be made when the land where the plaintiffs normally went to look for food and produce was acquired by the government. The compensation is not for the land but for what is above the land over which the plaintiffs have a right.

And in such confirmation, Gopal Sri Ram JCA said:

> According to the learned State Legal Adviser, the respondents' rights and the manner of their enforcement are exclusively governed by the Aboriginal Peoples Act 1954 ('the Act'). Consequently, there is no room for the co-existence of common law rights.
>
> A reading of the Act makes it plain that it does not exclude the rights vested in the respondents at common law. As pointed out by the learned judge, and by counsel for the respondents during argument before us, the Act in s. 2 creates a distinction between an 'aboriginal area' and an 'aboriginal inhabited place'. These are defined as follows:
>
> > 'aboriginal area' means an aboriginal area declared to be such under this Act.
> >
> > 'aboriginal inhabited place' means any place inhabited by an aboriginal community which has not been declared to be an aboriginal area or aboriginal reserve.
>
> Sections 5 and 6 of the Act which were relied upon by the appellants are concerned with an aboriginal area. However, the respondents' case is not based upon a claim that the land in question was an aboriginal area. They rely upon the absence of anything in the Act that excludes their common law rights to derive their livelihood from land which is an 'aboriginal inhabited place'. Herein lies the fallacy in the appellants' argument.

I follow the decision on the issue of their statutory rights. Hence, I need not labour too much on this issue.

13.(1) On their constitutional rights, the Constitution is the supreme law of the country. Article 4 provides that all laws passed after independence day, which are inconsistent with the Constitution, is void to the extent of the inconsistency. Under the Constitution, the aboriginal people enjoyed a special position. Article 8(5)(c) provides:

> (5) This article does not invalidate or prohibit:
>
> (c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsular (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service.

In the *Adong* case, wide interpretation was given to proprietary rights under art. 13 and the court held that the aboriginal peoples' rights both under the common law and the statutory law are proprietary rights protected by art. 13. The article provides:

> 13 Rights to property
>
> (1) No person shall be deprived of property save in accordance with law.
>
> (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

The learned judge in so holding said:

> The Federal Constitution art. 13 supersedes both statutory law and common law and mandates that all acquisition of proprietary rights shall be compensated and that any law made for the compulsory acquisition or use of property without compensation shall be rendered void in accordance with art 4 of the Federal Constitution. I assume that the alienation of the Linggiu valley lands in four titles was done under the National Land Code 1965 but the National Land Code 1965 does not provide for compensation of land acquired. However, the National Land Code 1965 must read as being subservient to art. 13 of the Federal Constitution and where there is no provision for compensation under statutory law, art. 13(2) should be read into that statute.

In the case before me, it is evident that the defendants purported to compensate the plaintiffs only for what had been provided for under the Act. To my mind, in the light of what had been pronounced in the *Adong* case as reflected above, such compensation is not adequate within the meaning of art. 13(2), although the Act is a special act relating to the aboriginal people. Therefore, I hold that the deprivation of the plaintiffs' proprietary rights was unlawful because they are entitled to the compensation in accordance with art. 13(2).

(2) The law governing the acquisition of land is the Land Acquisition Act 1960. Under s. 2, the word 'land' is defined to mean alienated land within the meaning of the State land law, land occupied under customary right and land occupied in expectation of title. To my mind, as the land was continuously occupied and maintained by them to the exclusion of others in pursuance of their culture and inherited by them from generation to generation in accordance with their customs, it falls within the ambit of 'land occupied under customary right' within the meaning of the definition. The expression 'land occupied under customary right' is not defined. Hence, in construing its meaning I adopt a purposive approach and hold that it should be given a wider interpretation so as to achieve the object of the LAA, that is to say, to ensure adequate compensation be paid for the land acquired. Although the Code including the previous State enactments make provision for the customary tenure and customary land-holder and that Judith Sihombing in the book entitled *'The National Land Code – A Commentary'* (Malayan Law Journal Sdn. Bhd, 1997) at paras. 353, 505-552 deal with those matters (in particular, in respect of the customary tenure referred to in s. 4(2) of the Code as that of the tribal adat in force in Negeri Sembilan and Malacca), in my view, it does not mean that the land cannot fall within the definition, because the Code and the enactments were enacted and the book was written before the *Adong* case was decided at the time when native title was unknown to our law. Further, by such construction full effect can be given to the requirements of arts. 13 and 8 of the Constitution otherwise ss. 11 and 12 of the Act relating to compensation would be *ultra vires* the Constitution, being inconsistent with the articles. And further, the definition clearly contemplates that the customary land may not have title and is distinguished from alienated land which has title and acquired land where the title is forthcoming. It should be noted that the definition of 'land' is peculiar to Malaysia only even though India and Singapore have similar legislation. Apart from the orang asli and the native people of the Borneo states, there are no other classes of people in Malaysia who occupy the said lands on the basis of customary right except the lands occupied under the tribal adat in Negeri Sembilan and Malacca. This was recognised when the Act was enacted. Thus, the Act speaks of aboriginal reserve land and aboriginal occupied land. The latter refers to hereditary land or customary land. The National Land Code (Penang and Malacca Titles) Act 1963 was enacted for the introduction of a system of registration of title to land in the States of Penang and Malacca, for the issue of replacement titles and for the assimilation of such system to the provisions of the Code, that is to say, to give full effect to the Torren system adopted. The absence of similar legislation in respect of the aboriginal land cannot be construed to mean that the aboriginal land is to be excluded from the expression 'land occupied under customary right' in the definition 'land' under the LAA. Therefore, the plaintiff must be compensated in accordance with the LAA.

14(1) The content of the fiduciary duties has been described in may ways. But in essence it is a duty to protect the welfare of the aborigines including their land rights and not to act in a manner inconsistent with those rights, and further to provide remedies where an infringement occurs. In *Mabo No. 2*, it was said that the obligation on the Crown was to ensure that the traditional title was not impaired or destroyed without the consent of or otherwise contrary to the interests of title holders. And in *the Wik Peoples* case it was reiterated that the fiduciary must act consistent with its duties to protect the welfare of the aboriginal people. The remedy, where the Government as trustee or fiduciary has breached its duties is in the usual form of legal remedies available, namely by declaration of rights, injunctions or a claim in damages and compensation.

(2) To my mind, the 1st and 4th defendant owe fiduciary duties towards the plaintiffs on the following grounds:

(a) By reason of the constitutional and statutory provisions. Article 8(5)(c) of the Constitution provides an exception to the equality provision in respect of any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsular (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service. In addition, Item 16 of the Ninth Schedule of the Constitution in List 1 – Federal List expressly empowers the Federal Government to enact laws for the welfare of the aborigines, though no specific law has been enacted on this after Merdeka. The Act is pre-Merdeka law. However, by art. 162(6) of the Constitution, any court applying pre-Merdeka law has to read it in conformity with the provisions of the Constitution. The object of the Act is to provide for the protection, well-being and advancement of the aboriginal peoples of West Malaysia. They need to be protected from unscrupulous exploitation and to safeguard their tribal organisation and way of life (see para. 92 in exh. P24).

(b) The JHEOA was set up pursuant to the Act charged with the responsibility of looking after the welfare of the orang asli. It made a significant policy statement in 1961 called 'Statement of Policy Regarding the Administration of the Orang Asli of Peninsular Malaysia' (see Ikatan C at pp. 45 to 49), which it considers as still applicable and forming the policy of the department (see DW7 at p. 171 of the Notes of Evidence). In respect of the land rights of the aborigines the Statement states:

> (d) The special position of aborigines in respect of land usage and land rights shall be recognised. This is, every effort will be made to encourage the more developed groups to adopt a settled way of life and thus to bring them economically into line with other communities in this country. Aborigines will not be moved from their traditional areas without their full consent.

(c) In a 1955 document the then adviser on aborigines in the Colonial Government expressly declared responsibility for the welfare of the orang asli in the Bukit Tampoi area (see Ikatan B at p. 105). Part of it reads:

> Batin Pa' Lapan is the overall Senior Headman of all the Orang Blandas Aborigines) in Selangor. He lives **on his own** land with his Aborigine group at BUKIT TAMPOI near DENGKIL.
>
> **This Department is responsible for him and his people** on behalf of the Government of the Federation of Malaya and the Selangor State Government.
>
> In any matters concerning BATIN PA' LAPAN and his people please refer to the Adviser on Aborigines at the address given above.

DW7 confirmed that the JHEOA still accepts the contents of the letter (see at p. 173 of the Notes of Evidence).

(3) It is evident that the Government is moving towards issuing permanent titles to orang asli lands but administratively hampered. It is also clear that the Government is implementing the integration policy in respect of the orang asli *vis-a-vis* the Malays by setting up 'Perkampungan Orang Melayu – Orang Asli'. Further, the Government had spent millions of ringgit to improve their standard of living so that they will have a better quality of life at par with the other races. However, to my mind, unfortunately notwithstanding its good efforts the Government had breached the fiduciary duties owed to the plaintiffs by:

(i) the deprivation of their proprietary rights without adequate compensation,

(ii) by the unlawful eviction of the plaintiffs from their lands. It is unlawful as the 14-day notice was unreasonable and insufficient, being non-compliant with the LAA procedure.

Therefore, had it not been for the reasons as stated in order (3) at para. 17 below the loss in consequence of the breach must be made good, and that loss would be the value of the lands lost as the result of the 1st and 4th defendants failing to protect it.

Trespass is a tort against possession. As the plaintiffs were in possession of the land a trespass had been committed in respect of the land. However, in my view, the 1st and 4th defendants are not liable for trespass by reason of the provisions of s. 6(4) of the GPA since the identity of the relevant officer has not been ascertained and the liability of the officer has not been established. For the same reason the 1st defendant is not liable in damages for the unlawful eviction. As for the 2nd and 3rd defendants, they are liable

to the plaintiffs for trespass. They cannot take shelter under the authority of either the 1st or 4th defendants or both, because trespass is against possession but not ownership, and their misdeeds are reflected by the presence of the highway on the land now which had been constructed by the 2nd defendant and maintained by the 3rd defendant.

To summarise:

(1) The land is customary and ancestral land occupied by the plaintiffs for generations.

(2) Under the common law, their proprietary interest in the land within the settlement is an interest in and to the land.

(3) Their rights under the common law and the Act are complementary to each other.

(4) Their rights both under the common law and the statutory law are proprietary rights protected by art. 13 of the Constitution.

(5) The compensation paid to them under the Act is not adequate within the meaning of art. 13(2) of the Constitution; therefore, the deprivation of the land was unlawful.

(6) They must be compensated under the LAA.

(7) The 1st and 4th defendants owe fiduciary duties towards the plaintiffs, which had been breached and therefore, the plaintiffs would be entitled to be compensated for the loss suffered which is the value of the land had it not been for the reasons as stated in order (3) at para. 17 below.

(8) The eviction of the plaintiffs from the land was unlawful because the 14-day notice given was unreasonable and insufficient.

(9) Trespass had been committed against the possession of the land by the plaintiffs. The 2nd and 3rd defendants are liable for it.

Therefore, the following orders are hereby made:

(1) All the declarations sought for in para. 2(1)(a) to (f) and 2(2)(b) to (f) above are granted. For para. 2(2)(a), declaration is refused because the land is not 'Malay reservation' within the meaning of art. 89(6) of the Constitution. Article 89 when read as a whole does not include the aboriginal people of the Malay Peninsular because the word 'natives' appearing in sub-art. (6) is defined in art. 161A(6) to mean the natives of Sabah and Sarawak. If it is meant to be otherwise the word 'aborigines' would have been used in the sub-art.

(2) The 1st defendant is to pay adequate compensation for the land to be assessed strictly in accordance with the LAA.

(3) No order is made for the breach of fiduciary duties since it is not specifically prayed for and to avoid duplicity in view of order (2).

(4) The 2nd and 3rd defendants are to pay damages to the plaintiffs for trespass.

(5) No order as to aggravated and exemplary damages because the 1st and the 4th defendants are not liable for trespass and unlawful eviction.

(6) As the parties had agreed that the hearing is for the purpose of determining liability only, the compensation in order (2) and the damages in order (4) above are to be assessed by the senior assistant registrar with interests to be awarded according to law.

(7) Costs to the plaintiffs against all the defendants.

**Appendix A**

**RULING**

(1) The preliminary issue before me is whether the Plaintiffs should be allowed to adduce oral histories of the aboriginal societies relating to their practices, customs and traditions and on their relationship with the land?

(2) The plaintiffs seek to introduce evidence of oral histories relating to (i) the status of the said land *viz*, the land use and (ii) the practices, customs and traditions of the plaintiffs who are 'orang asli' known as Temuans. The defendants object on the ground that it offends against the hearsay rule.

(3) Briefly, the plaintiffs plead (para. 1 to 6 of the statement of claim) that they are Temuans and had acquired rights over the said lands by land use and occupation through customs, original possession and usufructuary rights derived from their forefathers and still continuing up to the present time, notwithstanding the past or present legislations pertaining to land. The defendants, in their defence, though not challenging the plaintiffs' authenticity or origin assert that the plaintiffs are no longer practicing or observing their traditional way of life and put the plaintiffs to strict proof of their averments. This is the real dispute in this primary issue for my consideration.

(4) It is trite that hearsay evidence is to be excluded because it is not the best evidence and not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested

by cross-examination and the light which his demeanour would throw on his testimony is lost. That is the rational for the exclusion. Also, it is trite that hearsay becomes admissible only when specific provision has been made for its admissibility. Our pertinent legislation is the EA. Sections 32, 48, 49 and 50 are exceptions to the hearsay rule. In the context of the issue before me, s. 32(d) deals with the statement of a dead person which given the opinion of the person as to the existence of any public right or custom or matter of public or general interest (as opposed to private right, customs or interest), of the existence of which if it existed he would have been likely to be aware, and when the statement was made before any controversy as to the right, custom or matter had arisen and s. 32(e) is concerned with the statement relating to the existence of any relationship by blood, marriage or adoption on the same conditions as s. 32(d). Sections 48, 49 and 50 deal with the opinion of living person as to the existence of general right or customs, usages, tenets etc. and on relationship when relevant.

(5) It is manifestly clear that under art. 8(5)(c) of the Constitution and the Act the plaintiffs have the right to be protected and the right to well-being and advancement, in particular to land use. The situation here is similar to the aboriginal peoples of Canada where in the *Delgamuukw* case the Supreme Court of Canada affirmed the principles established in *Van der Peet viz*, first, that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit – must be understood against this background. The first principle relates to the difficulties inherent in demonstrating a continuity between current aboriginal activities and the pre-contact practices, customs and traditions of aboriginal societies. Since many aboriginal societies did not keep written records at the time of the contact or sovereignity, it would be exceedingly difficult for them to produce conclusive evidence from pre-contact times about the practices, customs and traditions of their community. The second principle is to adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of the past.

(6) However, in Malaysia, the rules of evidence are codified and the reception of the UK common law under s. 3 of the Civil Law Act 1956 does not cover the hearsay rule. We have to look only at the four corners of the EA whether oral histories of aboriginal societies should be accepted and if so, under what circumstances. In this respect s. 32(d) and (e) come into

play. Section 32 permits verbal statement as well. Based on this fact ie, the enabling provision, I am sure the framers of the EA would have been aware or ought to have been aware of the fact that our aboriginal peoples also did not keep or have written records of their histories. That being the case, the evidentiary difficulties as envisaged should not be a reason for the courts here to create further exceptions to the hearsay rule other than what have been codified otherwise it will make a mockery of the law. Although the courts in Canada, USA and Australia had adopted a liberal approach in this respect, the courts here must interpret and apply the relevant laws as existing until they are amended.

(7) It is pertinent to note that s. 32(d) of the EA merely permits statement of a dead person in the form of an opinion. Dr. Das contends that such statement is in fact only an opinion but still admissible except as to weight and how much weight to be attached to it will depend very much on the status of the maker in relation to the subject matter of the statement; eg, a Batin or a Penghulu Balai/Ketua Adat stating their practices, customs and tradition and on their relationship with the land. I agree with that contention in the sense that the statement gives the opinion of the declarant, that is to say, of general reputation which his position has naturally brought within his knowledge and not of facts within the declarant's knowledge. The statement must be founded on the concurring opinions of many others of the community who are equally interested in the matter, and which opinion having thus accumulated and grown through generations, furnishes strong presumptive evidence of its trustworthiness, such as statement of general reputation made by a Batin that the boundaries of land were demarcated by certain trees or made by a Penghulu Balai/Ketua Adat that the graves of their ancestors were lighted and provided with food for the souls to eat.

(8) In the final analysis, it is my considered view that, in principle, oral histories of the aboriginal societies relating to their practices, customs and traditions and on their relationship with land should be admitted subject to the confines of the EA, in particular s. 32(d) and (e), that is to say:

(i) They must be of public or general nature or of public or general interest,

(ii) The statement must be made by a competent person, ie, one who 'would have been likely to be aware' of the existence of the right customs or matter, and

(iii) The statement must be made before the controversy as to the right, customs or matter had arisen.

(9) In arriving at this decision I did also consider the necessity of the plaintiffs to overcome the burden of strict proof placed on them by the defendants. To my mind, the plaintiffs may do so by resorting to the aforesaid provisions of the EA and that would be sufficient because the degree of proof placed on the plaintiffs is only on the balance of probabilities. However, this is not a blanket sanction but just on *ad hoc* basis. That is to say, the defendants or the plaintiffs, as the case may be, are entitled to object to a particular piece of evidence to be given by a witness during the trial, only if it merits objection, and the matter may be argued on the respective merits only within the confines of this decision that I made.